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Evidence

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EVIDENCE

by

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ALTHOUGH no really significant cases on the law of evidence were decided during the past year, there were several interesting developments dealing with impeachment by prior conviction, presumptions, the names of witnesses, and considerations on motions for summary judgment.

I. IMPEACHMENT BY PRIOR CONVICTION

Several years ago the United States Supreme Court in *Burgett v. Texas*[1] held that a prior conviction that is void because obtained in violation of the right to counsel cannot be used for enhancement of punishment in a later prosecution. Two recent cases have limited *Burgett*, holding it inapplicable if a prior conviction is used only for the purpose of impeachment.

The first case, *Simmons v. State*,[2] involved an accused who filed a motion for probation in which he swore that he had never been convicted of a felony in Texas or any other state. At the trial, after the state had rested its case, the accused moved the court to instruct state's counsel not to discuss an alleged conviction in the state of Louisiana "during the year . . . 1957."[3] The reasons given were that it was a juvenile proceeding and that he was not represented by counsel. There was some confusion about whether the proceeding was in fact juvenile, and it later appeared that it probably was not. In any event, the complaint concerning absence of counsel was clearly made and preserved. The trial judge stated that the motion was premature, but instructed state's counsel "that they may use only the method of impeaching questions that display and are supported by good faith and the reason for asking such question."[4] After the accused had testified, he was impeached by a showing of two misdemeanor convictions involving moral turpitude. He then was asked if he had ever been convicted of a felony in Texas or any other state in the past ten years. He answered that he had not, and the answer was truthful, since the Louisiana conviction was twelve years old at the time of trial.[5] He was then asked specifically about the Louisiana conviction for the offense of felony theft, and he denied it also. The state was allowed to enter into evidence exemplified copies of the charge and conviction. The record of conviction was also retendered and admitted at the punishment stage of the trial. The court of criminal appeals affirmed the conviction, but did not squarely hold that the impeachment by

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[1] 389 U.S. 109 (1967).

[2] 456 S.W.2d 66 (Tex. Crim. App. 1970).

[3] *Id.* at 68.

[4] *Id.*

[5] It is interesting to note that under Proposed Federal Rules of Evidence 6-09(b), 51 F.R.D. 315, 391 (Rev. Draft 1971), the conviction would not have been admissible, since more than ten years had elapsed from both the date of conviction and the date of release.

use of the void conviction was proper, there being some indication that it considered the use of the void conviction, if error, harmless.[6]

Judge Morrison, concurring, recognized the trend to the contrary, but believed that *Burgett* should not be extended to the particular facts of the case, "where this apppellant denied that he had been convicted of the felony in Louisiana and the state was able to prove that he was lying."[7] Judge Onion dissented, taking the clear position that *Burgett* should apply to the use of void convictions for impeachment purposes. He discussed a number of cases from other jurisdictions that, either directly or indirectly, supported his position. Among the strongest authorities were the California decisions of *People v. Coffey*,[8] decided before *Burgett*, and *In re Dabney*,[9] decided after *Burgett*. Both involved impeachment, both discussed the problem of harmless error, and both reached the same result: The use of convictions obtained without the benefit of counsel for any purpose is constitutionally prohibited.

In the second case, *Loper v. Beto*,[10] the Fifth Circuit faced a similar problem. Loper was impeached in a 1947 state court trial by the use of four prior convictions. He petitioned for a writ of habeas corpus, claiming, *inter alia*, that he had not been represented by counsel at the trials resulting in those convictions, and that because of *Burgett*, they should not have been used. He obviously did not raise the issue at the time of the prior trials, since there was then no issue to raise. Except for the assertion at the habeas corpus hearing, there was no evidence on the issue of representation. The court, citing *Simmons* as authority, refused to extend *Burgett*, noting that in nearly thirty years there had been no effort to set aside the prior convictions, and that impeachment was not nearly so serious an issue as enhancement. However, the court weakened its position by also citing *Bustillos v. State*,[11] a case which did not involve the use of void convictions. In addition, a Ninth Circuit decision[12] was quoted to show the California authority, but it too did not involve void convictions and, as shown above, the rule in California is contrary to that of *Simmons*.

A close reading of *Burgett* leads one to conclude that Judge Onion has the better argument:

> Gideon v. Wainwright established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth, making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one. And that ruling was not limited to prospective applications. . . . In this case the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his

[6] 456 S.W.2d at 75.

[7] *Id.*

[8] 67 Cal. 2d 204, 430 P.2d 15, 60 Cal. Rptr. 457 (1967).

[9] 71 Cal. 2d 13, 452 P.2d 924, 76 Cal. Rptr. 636 (1969). Judge Onion also cited and discussed the following cases: Shorter v. United States, 412 F.2d 428 (9th Cir. 1969); Tucker v. United States, 299 F. Supp. 1376 (N.D. Cal. 1969); People v. Shook, 67 Ill. App. 2d 492, 214 N.E.2d 546 (1966); Johnson v. State, 9 Md. App. 166, 263 A.2d 232 (1970); Gilday v. Commonwealth, 355 Mass. 799, 247 N.E.2d 396 (1969); Boley v. State, 85 Nev. 466, 456 P.2d 447 (1969).

[10] 440 F.2d 934 (5th Cir. 1971).

[11] 464 S.W.2d 118 (Tex. Crim. App. 1971).

[12] Barbosa v. Craven, 431 F.2d 689 (9th Cir. 1970), citing People v. Ricci, 239 Cal. App. 2d 233, 48 Cal. Rptr. 631 (1966).

> conviction was void. Presuming waiver of counsel from a silent record is impermissible. . . . To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.
>
> The admission of a prior criminal conviction which is constitutionally infirm under the standards of Gideon v. Wainwright is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error 'harmless beyond a reasonable doubt' within the meaning of Chapman v. California . . . .[13]

It should be noted that in *Burgett* the trial court finally excluded the evidence of the prior convictions and instructed the jury to disregard them for *all* purposes. Therefore, it is clear that they were not actually used for enhancement. The conclusion of the Fifth Circuit that the controlling consideration was the purpose for which Loper's prior convictions were used is considerably weakened in light of that fact. Furthermore, in *Simmons* the convictions were admitted at both stages of the bifurcated trial. It is difficult to believe that a jury would accord less significance to a conviction that has the apparent blessing of a court, for whatever purpose, than to a conviction that the jury has been expressly told to disregard.

When one considers that for all practical purposes the jury is more apt to use a prior conviction in deciding guilt than in deciding credibility, and when one also considers the recent enlightened decision of the Supreme Court of Texas on the issue of impeachment by prior convictions,[14] one must describe both *Simmons* and *Loper* in the words of the poet: "Waddle, waddle, little turtle, slow as mush, tush, tush."[15]

II. PRESUMPTIONS

Three interesting cases discussed the problem of the effect of a rebutted presumption. In *Robertson Tank Lines, Inc. v. Van Cleave*[16] suit was brought against Robertson and its employee, a truck driver, for wrongful death flowing from a collision with a company truck. The jury found that the driver had been negligent, and that the negligence was a proximate cause of the death. It also found that the driver was acting in the scope of his employment. The trial court rendered judgment against the driver, and that portion of the case was not appealed. However, the trial court disregarded the answers on scope of employment and rendered judgment for Robertson. There was no evidence affirmatively showing that the driver was acting within the scope of his employment, but the court of civil appeals reversed and rendered judgment against Robertson on the basis of the presumption arising from proof of ownership of the vehicle and employment of the driver.[17] The supreme court reversed the

[13] Burgett v. Texas, 389 U.S. 109, 114-15 (1967).
[14] Landry v. Travelers Ins. Co., 458 S.W.2d 649 (Tex. 1970). *See also* Elliott, *Evidence, Annual Survey of Texas Law*, 25 SW. L.J. 135 (1971).
[15] Unpublished manuscript by E. Zapalac.
[16] 468 S.W.2d 354 (Tex. 1971).
[17] 454 S.W.2d 785, 792 (Tex. Civ. App.—Houston [1st Dist.] 1970).

judgment of the court of civil appeals and affirmed that of the trial court, holding that the basic facts of ownership and employment, standing alone and rebutted by positive evidence that the driver *was not* acting within the scope of his employment, do not constitute probative evidence that the driver *was* acting within the scope.[18]

Texas cases have generally established that presumptions are treated in the manner as those defined by McCormick as "mandatory presumptions."[19] The effect is simply one of placing the burden of producing evidence on an issue. In *Robertson* the plaintiff had the burden of establishing the basic facts, *i.e.*, ownership and employment; when this was accomplished, the presumption became operative. The defendant then had to come forward with some evidence negativing scope of employment or the issue would be established in the plaintiff's favor. Since the defendant did produce rebutting evidence, the presumption "vanished" and no longer affected the outcome of the case. This result does not necessarily mean that the plaintiff must produce a larger quantum of evidence than the defendant or suffer the consequence that the issue will be established in the defendant's favor. The basic facts remain even if the presumption has disappeared. The question, then, is whether the jury can draw the desired inference from the basic facts alone. The holding of the court in *Robertson* is that it may not infer scope of employment from the basic facts of ownership and employment.

An example of the operation of the rule with respect to another presumption is found in *Kamenoff v. Meadows*.[20] Here evidence was presented that a notice was mailed, properly addressed and with the correct postage affixed. These basic facts gave rise to the presumption that the notice was received. The presumed fact was rebutted by evidence of nonreceipt. Again, the presumption vanished, but the basic facts of proper mailing remained. The court held that a fact question on the issue of receipt was presented, since the facts afforded " 'a legal basis for a fact finding that it was received,' and 'they tend to sustain' a finding of fact 'no matter what other facts the record may reveal.' "[21] The court cited, *inter alia*, *Southland Life Insurance Co. v. Greenwade*[22] for the proposition, a case distinguished by the supreme court in *Robertson*.

A similar result was reached in *Sudduth v. Commonwealth County Mutual Insurance Co.*,[23] although there was an interesting twist concerning the presumption itself. The issue was whether a notice had been *mailed*. There was affirmative evidence of mailing and affirmative evidence of nonreceipt. This would destroy a presumption of receipt, but there was no need to prove receipt. However, it was stated that evidence of nonreceipt raised a presumption of nonmailing. Since that in turn had been rebutted by evidence of mailing, no presumptions remained. The evidence then showed mailing and nonreceipt. It

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[18] 468 S.W.2d at 359-61.

[19] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 308 (1954). *See also* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 51 (1956).

[20] 457 S.W.2d 574 (Tex. Civ. App.—Waco 1970).

[21] *Id.* at 576, quoting Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 159 S.W.2d 854 (1942).

[22] 138 Tex. 450, 159 S.W.2d 854 (1942).

[23] 454 S.W.2d 196 (Tex. 1970).

could be inferred, not presumed, from the evidence of nonreceipt that the notice was not mailed, so the evidence was in dispute, precluding summary judgment.

The lesson of these three cases is a simple one: Once a presumption is rebutted, the court is no longer concerned with it. Its task at that point is exactly the same as it would have been had no presumption ever entered the case. The test to be applied is the one commonly accepted standard applicable to motions for instructed verdict or for summary judgment.

III. NAMES OF WITNESSES

In *Boyles v. Houston Lighting & Power Co.*[24] the supreme court reinforced its earlier decision in *Dallas Railway & Terminal Co. v. Oehler.*[25] On cross-examination in *Boyles* an expert appraisal witness of the landowners was asked if he knew the names of any other appraisers who had looked at the property on behalf of the landowners. Objection to this question was sustained. The court of civil appeals held this to be reversible error, stating that the condemnor "had a right to inquire of the witnesses as to the names of other expert appraisers who had appraised the property on behalf of the landowners."[26] This decision was based on the appellant's "right to call as its witness any person qualified to give testimony, regardless of the fact that appellees may have hired him previously to appraise the property."[27]

The supreme court reversed on the basis of its decision in *Oehler.* In *Oehler* it was held that a list of witnesses to a bus accident in the possession of the defendant did not have to be produced at the trial in response to a subpoena duces tecum, since the list and the names of the witnesses themselves were not relevant to the material issues of the trial. Whether the missing witnesses could be called by the party seeking them if they were found in some other way simply was not at issue in either *Oehler* or *Boyles.*

The 1971 amendments to the discovery and deposition rules pose an interesting question that might have been applied in *Boyles.* Suppose that during the discovery process the condemnor had made a request, by use of written interrogatories under rule 168,[28] or by deposition and subpoena duces tecum, that the landowners supply the names of any other appraisers who had looked at the property on their behalf. Prior to the amendments it is clear that the information would have been protected, and beyond the scope of discovery.[29] However, rule 186a now contains the proviso that "information relating to the identity and location of any potential party or witness to the occurrence at issue may be obtained from any person having such knowledge."[30] Would the appraisers be considered "witness[es] to the occurrence at issue"? Although there appears to be no authority on the subject, it is suggested that since the purpose of the

[24] 464 S.W.2d 359 (Tex. 1971).
[25] 156 Tex. 488, 296 S.W.2d 757 (1956).
[26] 456 S.W.2d 714, 719 (Tex. Civ. App.—Beaumont 1970).
[27] *Id.* at 720.
[28] TEX. R. CIV. P. 168.
[29] *Ex parte* Hanlon, 406 S.W.2d 204 (Tex. 1966); *Ex parte* Ladon, 160 Tex. 7, 325 S.W.2d 121 (1959).
[30] TEX. R. CIV. P. 186a; *see* Comment, *Discovery of Witnesses and Potential Parties in Texas,* 50 TEXAS L. REV. 351 (1972).

amendment was remedial, the term "occurrence at issue" will not be construed restrictively. The names of witnesses, whether appraisers or other experts, will be discoverable prior to trial, but the result in *Boyles* will remain unchanged, since the names are still not relevant to any material issue in the case.

IV. SUMMARY JUDGMENT EVIDENCE

Although not falling strictly under the heading of evidence, note should be taken of a long-awaited development. The supreme court has held in *Hidalgo v. Surety Savings & Loan Ass'n*,[31] after much vacillation by courts of civil appeals, that sworn pleadings, when countered by proper affidavits, cannot be considered part of the "evidence" in deciding motions for summary judgment. Although the concurring opinion objected to an expansion of the holding beyond the particular facts of the case,[32] the correct result has been reached.

[31] 462 S.W.2d 540 (Tex. 1971).
[32] *Id.* at 545 (Walker, J., concurring).